90-1392

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM E. CURRIER and
ROBERT C. BRAUN,

PETITIONERS,

VS.

CHARLES J. BALDRIDGE and
ROBERT DALE OSBORN,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH Circuit

APPENDIX TO THE PETITION

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-2995

WILLIAM E. CURRIER and ROBERT C. BRAUN,

Plaintiffs-Appellants,

v.

SERGEANT CHARLES J. BALDRIDGE, and CORPORAL ROBERT D. OSBORN, police officers of the New Berlin Police Department and all those acting in concert on conspiracy therewith.

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin. No 88 C 191 - Thomas J. Curran, Judge

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ARGUED APRIL 12, 1990
Decided October 1, 1990

Before BAUER, Chief Judge, CUMMINGS and WOOD, Jr. Circuit Judges

WOOD, Jr., Circuit Judge. Plaintiffs William E. Currier and Robert C. Braun profess to be members of the American Heritage Forum ("AHF"), an organization apparently dedicated to the propagation of litigation. What the organization's goals

are or whether such an organization even exists are matters of some dispute, but at this stage of the litigation, we must draw factual inferences in favor of the plaintiffs. The plaintiffs characterize AHF as a non-violent affiliation of Christians that desire a return to "America's common law heritage." To throw off the manacles of burdensome governmental regulation, AHF members have refused to register their cars with the state of Wisconsin.

AHF member Nancy Knies dutifully refused to register her automobile, and like many who practice civil disobedience, suffered the consequences. In his capacity as a police sergeant for the city of New Berlin, Wisconsin, defendant Charles J. Baldridge arrested Knies and impounded her car. The record becomes unclear, but at some point Knies brought legal proceedings to gain return of her car, naming Baldridge and a Wisconsin judge as defen-

dants.

Leaving Knies for the moment, we move to the plight of another AHF member, Al Feustel, on the night of February 19, 1986. Feustel was in court that night, challenging a traffic charge, and a number of AHF members had accompanied him. Among the AHF members present in the courtroom were Knies, plaintiff Currier, and plaintiff Braun. Defendant Baldridge was serving as the courtroom bailiff, and Knies wanted to seize this opportunity to serve him with legal papers connected to her case. The exact content of these papers is unknown but is of little consequence given our disposition of this case.

Knies enlisted Currier to serve the papers on Baldridge, and Currier dutifully complied. Currier confronted Baldridge in the courthouse hallway, but Baldridge, aware of AHF members' litigious propensities, wanted nothing to do with him. Undaunted, Currier made a second attempt at

service, this time inside the courtroom. Currier approached Baldridge from the rear, struck him with the legal papers, let the papers drop to Baldridge's feet, and declared, "You are served." Baldridge turned around and responded, "You are under arrest."

Currier initially darted away from Baldridge, but he quickly changed his mind and submitted to the arrest. The other defendant, police corporal Robert D. Osborn, joined the scene at this moment, assisting Baldridge with Currier's custody. Baldridge and Osborn then moved Currier into a conference room located just off the courtroom. After other officers had joined them, Baldridge and Osborn tried to transport their prisoner to the police station.

Baldridge and Osborn did not even get outside of the courtroom before trouble broke out. While being escorted by two other police officers and in front of a

number of AHF members, Currier slumped to the courtroom floor with a loud groan. At this point, plaintiff Braun asserted himself, exhorting the officers not to hurt his fellow AHF member. The parties dispute who was the aggressor, but it is undisputed that a frey then ensued, for which Braun was charged with disorderly conduct.

For his actions that night, Currier was charged with one count of obstructing a police officer and two counts of disorderly conduct. Currier's disorderly conduct charges stemmed first from his initial actions in striking Baldridge with the legal papers and second from his incitement of the courtroom crowd by dropping to his knees and groaning. Currier was convicted only for the second disorderly conduct count. Braun was also convicted on his disorderly conduct charge.

Currier and Braun are now in federal court with this section 1983 action

against the police officers responsible for their arrests that night. The district court dismissed all of the plaintiffs' complant. On appeal, we are left only with Baldridge and Osborn as party defendants and, despite characterizations to the contrary in plaintiffs' somewhat opaque brief, with only two claims for adjudication. First, the plaintiffs charge a violation of their first amendment rights to free speech, petition, and assembly for the defendants' willful interference with their ability to engage in group litigation. Second, the plaintiffs charge a violation of their fourth amendment rights for wrongful arrest. Of course, both of these rights apply to this case through their incorporation in the fourteenth amendment.

As to their first amendment claim, the plaintiffs assert that AHF was using Knies's suit as a vehicle to protest Wisconsin's oppressive automobile regis-

tration laws. The Supreme Court has recognized a "common thread running through our decisions...is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transp. Union v. State Bar, 401 U.S. 576, 585(1971). The plaintiffs' attempts to characterize Knies's replevin action as litigation is search of political change devalue the truly important social contexts in which this right has arisen. See, e.g., Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1(1964); NAACP v. Button, 371 U.S. 415(1963). Although the first amendment does not place relative values on various groups' ideologies, there are still limits to its guarantees, and the plaintiffs' desire to aid Knies in private litigation for the recovery of her personal automobile may fall outside the scope of the amendment's protections. We need not de-

cide this issue, however, because even if applicable to this case, the plaintiffs have failed to show how the defendants burdened this right.

The plaintiffs allege that Baldridge arrested Currier while he was trying to serve legal process on Baldridge, and thus the arrest may appear to have hindered the Knies litigation. Despite Currier's arrest, however, the attempt at process was still effective; for service of process on recalcitrant defendants, Wisconsin accepts the general method of placing a summons in the general vicinity of the person to be served and announcing the nature of the papers. Aee Borden v. Borden, 63 Wis. 374, 377, 23 N.W. 573, 574 (1885); In re Guardianship of K.N.K., 139 Wis.2d 190, 214-15, 407 N.W.2d 281, 292(Wis. Ct. App. 1987); see also Hatmaker v. Hatmaker, 337 Ill. App. 175, 182, 85 N.E.2d 345, 348 (1949); Union Nat'l Bank v. Pacamor Bearings, Inc., 132 Misc.2d 269, 503

N.Y.S.2d 671, 672(Sup. Ct. 1986); Chernick v. Rodriquez, 2 Misc.2d 891, 150 N.Y.S.2d 149, 150(Sup. Ct. 1956); Flex Credit, Inc. v. Winkowitsch, 428 N.W.2d 236, 239(N.C. 1988); Nielsen v. Braland, 264 Min. 481, 484, 119 N.W.2d 737, 739(Minn. 1963). Nothing that Baldridge did burdened the ability of the plaintiffs to engage in group litigation. The plaintiffs have not pointed to any obstacles that Currier's arrest placed in the path of their desire to pursue judicial remedies as a means of social change.

As an alternative, plaintiffs Braun and Currier might claim that Currier's arrest "chilled" their desire to support AHF's litigation efforts, but this theory is better analyzed under the plaintiffs' fourth amendment claims for wrongful arrest. If the arrests were supported by probable cause, then the plaintiffs have no cause of action, under the first amendment or otherwise.

We turn first to Braun's wrongful arrest claim because it is the least complicated. Braun was arrested for and convicted of disorderly conduct for interfering with the police as they led Currier out of the courtroom. The conviction supports the arrest: a plaintiff's previous conviction collaterally estops the plaintiff from reasserting a lack of probable cause. Allen v. McCurry, 449 U.S. 90(1980). The existence of probable cause bars the section 1983 action. Kompare v. Stein, 801 F.2d 883, 891 (7th Cir. 1986).

Currier's wrongful arrest claim is more problematic. Currier was initially arrested for his attempt to serve legal papers on officer Baldridge, but Currier was only convicted for his disorderly conduct after his arrest and as he was being led from the courtroom. Thus, Currier was charged with two counts of disorderly conduct, but only convicted of one. Contrary to the defendants' assertion, the convic-

tion does not collaterally estop Currier from asserting the invalidity of his initial arrest.

At a preliminary hearing, a Wisconsin state court presumably made a finding that Currier's initial arrest was supported by probable cause. If such a finding was made in the course of Currier's criminal case, it might work a collateral estoppel against him. See Guenther v. Holmgreen, 738 F.2d 879, 883-89(7th Cir. 1984), cert. denied, 469 U.S. 1212 (1985). Nevertheless, the defendants have not chosen this route, instead resting their collateral estoppel argument solely on the effects of Currier's conviction. Collateral estoppel, like a lot of issues in this court, can be waived. See Blondel-Toungue Laboratories v. University of Ill. Found., 402 U.S. 313, 350 (1971); West Virginia N. R.R. v. United States, 391 F.2d 627, 636 (Ct. Cl.1968). The defendants did not raise the collateral estoppel effects of

preliminary proceedings in Currier's criminal case, and neither will we.

However, the mere fact that Currier was acquitted of the crime for which he was initially arrested does not lead to section 1983 liability for the arresting officer. See Baker v. McCollan, 443 U.S. 137, 145 (1979); Pierson v. Ray, 386 U.S. 547, 555 (1967). As we noted above, if the arrest was supported by probable cause, then no cause of action will lie. While Currier disputes the exact chain of events that led to his arrest, his claim falls within the language of Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986), and Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 249-50 (1986). Currier has failed to come forward with sufficient evidence that could support a jury verdict in his favor on an element of his claim for which he would bear the burden of proof at trial. The evidence is undisputed that Currier made physical contact with Baldridge as

he attempted to serve the officer with legal papers. Currier quibbles with the defendants' characterization of this contact as a "striking," but any physical contact within a courtroom between a police officer and a private citizen would tend "to cause or provoke a disturbance" as the state of Wisconsin has defined disorderly conduct. Wis. Stat. §947.01. Because Currier's conduct occurred in the presence of the defendants, they had probable cause to arrest him.

The plaintiffs have shown no constitutional right that the defendants violated. Accordingly, the judgment of the district court is AFFIRMED.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM E. CURRIER,
ROBERT C. BRAUN, and
RICK G. ALTHISER,
Plaintiff,

v. Case No. 88-C-191

SGT. CHARLES J. BALDRIDGE,
CPL. ROBERT D. OSBORN,
PTM. THOMAS T. STRUEBING,
SGT. CHARLES D. SCHROEDER, and
PTM GREGORY FRIBERG, police
officers for the New Berlin
Police Department and all
those acting in concert on
conspiracy therewith,
Defendant.

file stamped June 15, 1989

DECISION AND ORDER

Plaintiffs William E. Currier, Robert C. Braun and Rick G. Althiser have commenced the above-captioned case against five police officers of the City of New Berlin (Wisconsin): Charles J. Baldridge, Robert Osborn, Thomas Struebing, Charles Schroeder and Gregory Friberg. In their Second Amended Complaint the plaintiffs assert four causes of action against the defen-

dant pursuant to 14 U.S.C. § 1983. They allege that the defendants deprived them of rights guaranteed by the First Amendment to the United States Constitution; that the defendants arrested them without probable cause to keep them from exercising their First Amendment rights and in violation of the Fourth and Fourteenth Amendments; that the defendants used unreasonable force in effecting their arrests in violation of the Fourth and Eighth Amendments; and that the defendants defamed them by issuing a false press release.[1] Currier, Braun and Althiser are seeking actual, general and punitive damages, as well as attorney fees, for their injuries. If the plaintiffs have alleged justiciable constitutional claims, this court would have jurisdiction over the subject matter of these claims pursuant to 28 U.S.C. §§1331 and 1343(a).

The defendants answered, denying liability and asserting the defense of im-

munity. After the deadline for the completion of all discovery of fact witnesses had passed, defendants moved for summary judgment. See Federal Rule of Civil Procedure 56. This motion is now fully briefed and ready for decision.

I. FACTS

Although the parties disagree as to many of the details of the events which gave rise to the plaintiffs' claims, undisputed portions of the record establish the material contours of the events of the arrests and subsequent trials of Currier, Braun and Althiser.

On February 19, 1986, the three plaintiffs traveled to the New Berlin Municipal Building to watch a hearing on a traffic charge against Alfred Feustel. Officer Baldridge was present in the dual capacity of witness and bailiff.

In the courtroom Currier twice

attempted to serve papers on Baldridge for a civil case involving a third person - Nancy Knise. During the second attempt Currier struck Baldridge with the papers. Baldridge then told Currier he was under arrest. Currier attempted to retreat but was apprehended and handcuffed by Baldridge and placed in a conference room. As police officers attempted to take Currier out of the Municipal Building, Currier dropped to the floor. Braun shouted at the police to stop hurting Currier, then Braun was arrested for allegedly pushing or shoving the officers. Officers Baldridge and Osborn pinned Braun to the floor, then handcuffed him and placed him in the conference room. When Althiser attempted to enter the conference room, he was commanded to halt by Officer Struebing. After Althiser swung his fist at Officer Struebing the police attempted to arrest him. Althiser resisted, so Officers Struebing, Osborn, Baldridge and Schroe-

der joined in the effort to subdue him. During the fray, Officer Friberg retrieved a knife from the floor which had been in Althiser's hand. Althiser claims that he was struck on the head. It is undisputed that Officer Schroeder administered a pain compliance technique which enabled Officer Friberg to handcuff Althiser.

Following the arrests, all three defendants were temporarily detained in the Waukesha County Jail. Braun and Althiser, who claimed to have been injured, were taken to a hospital where they were examined by medical personnel.

Currier, Braun and Althiser were tried separately. Based on the events of February 19, Currier was charged with two counts of disorderly conduct and one count of obstructing an officer. He was found guilty of one count of disorderly conduct. Braun was charged with two counts of disorderly conduct, one count of resisting arrest, and one count of criminal

damage to property. He was found guilty of one count of disorderly conduct. Althiser was charged with one count of disorderly conduct and one count of resisting arrest. He was found guilty of one count of disorderly conduct.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(c), parties moving for summary judgment must show that the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law. See Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986); McGraw-Edison Company v. Walt Disney Productions, 787 F.2d 1163, 1167 (7th Cir. 1986). When faced with a properly supported motion for summary judgment, the

nonmovants may not avoid judgment by simply resting on their pleadings. If the nonmovants bear the burden of production on an issue at trial, they must affirmatively demonstrate, by specific showings, that there is a genuine issue of material fact requiring a trial. See First National Bank of Cicero v. Lewco Securities Corporation, 860 F.2d 1407, 1411 (7th Cir. 1988).

A "genuine" factual issue is one that properly can be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A summary judgment procedure is not meant to be a trial on affidavits. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable in-

ferences from the facts are to be drawn in in his favor." Anderson, 477 U.S. at 255. At the summary judgment stage the judge's function is to determine whether there is sufficient evidence favoring the nonmoving parties for a jury to return a verdict for that party. See First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 288-89 (1968). This inquiry implicates the substantive evidentiary standard of proof that would apply at a trial on the merits. Thus, in a civil case such as this, the record must show that a jury could find by a preponderance of the evidence that the parties upon whom the burden of proof is imposed are entitled to a verdict in their favor. See Anderson, 477 U.S. at 252. If the parties' evidence is merely colorable, or is not significantly probative, summary judgment may be granted. See Id. at 249-50.

"As to materiality, the substantive law will identify which facts are material.

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248. "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

The Supreme Court has emphasized that, even where intent or motive is at issue, the nonmovants cannot rest on their pleadings, but must present affirmative evidence, even where the evidence is likely to be within the possession of the defendants, as long as the plaintiffs have had a full opportunity to conduct dis-

covery. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

III. DISCUSSION

In the instant case the defendants argue they are entitled to summary judgment as a matter of law on the following grounds: the doctrine of issue preclusion bars the plaintiff from relitigating the issues of probable cause and excessive force; the police officers are entitled to qualified immunity; the plaintiffs cannot meet their burden of showing that any of the alleged constitutional deprivations caused any compensable injury; the police officers have absolute immunity for their roles in the underlying criminal cases; and, the plaintiffs cannot support their claims of conspiracy. If the court does not grant summary judgment as to all claims, the defendants ask that the trials of the plaintiffs be severed.

A. FIRST AMENDMENT CLAIMS

The plaintiffs say that the core issue of this case is whether they were arrested for exercising their First Amendment rights to assemble peaceably and to petition for a redress of grievances because the defendants "were sick and tired of dealing with AHF [American Heritage Forum][2] members and their litigious propensities." Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 2.

Officer Baldridge has admitted that he was "fed up" with receiving legal papers from associates of the plaintiffs. See Affidavit of Timothy J. O'Brien at Exhibit F, p. 167. Nevertheless, neither this admission nor any other evidence introduced by the plaintiffs shows that the defendants were motivated by an intent to deprive the plaintiffs of their First Amendment rights when they arrested and

subdued them on February 19, 1986.

As a threshold matter, it is not clear that Currier, Braun or Althiser have standing to raise a claim that their right to petition was violated when Currier tried to serve papers on Officer Baldridge. The papers were for a case involving Nancy Knies and neither Currier nor Braun nor Althiser were parties to that case. Therefore, none of the plaintiffs were exercising their own rights to petition and they cannot maintain this claim on behalf of a third party. Moreover, the record shows that Currier made two attempts to serve Officer Baldridge. He was arrested after the second attempt only because he struck Officer Baldridge. The First Amendment does not protect illegal acts such as disorderly conduct or striking a police officer merely because the actor claims to be attempting to serve legal papers. Cf. United States v. O'Brien,, 391 U.S. 367, 376 (1968);

State v. Minniecheske, 118 Wis.2d 357, 360, 347 N.W.2d 610, ___(Ct. App. 1984).

The plaintiffs also attempt to imply that the defendants came to the hearing for the purpose of frustrating the efforts of the plaintiffs to assemble and to serve papers. Given the uncontroverted facts in the record, this inference is not reasonable. Officers Baldridge and Osborn were at the New Berlin Municipal building on the night in question to serve as witnesses at the Feustal hearing. The other officers were called to the scene by a city employee when the disturbance erupted. Although Officer Baldridge was aware of Nancy Knies and some of her associates, there is no evidence that the defendants had any knowledge of the identity or ideology of Currier, Braun or Althiser prior to February 19, 1986. Furthermore, on that evening all the contacts which led to the arrests were initiated by the plaintiffs.

The plaintiffs have not produced a scintilla of evidence or even raised a reasonable inference that protected conduct was a motivating factor in their arrests. See Mount Healthy School Disdistrict, Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Nekolny v. Painter, 653 F.2d 1164, 1167 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). Therefore, summary judgment must be granted in favor of the defendants on the First Amendment claims. See Rakovich v. Wade, 850 F.2d 1180, 1210 (7th Cir.)(en banc) (merely conclusory allegations of unconstitutional motive, devoid of factual support, must be found lacking and be dismissed), cert. denied, 109 S.Ct. 497 (1988). In addition, because the plaintiffs have failed to establish any underlying claim that the defendants conspired to deprive them of their rights to assemble and to petition for a redress of their grievances.

B. FOURTH AMENDMENT CLAIMS

1. Arrest and Detention

In their Second Amended Complaint, the plaintiffs claim that they were "arrested, seized and detained from their liberties without probable cause, absent any reasonably objective belief as to same and with specific intent to frustrate and discourage Plaintiffs from the exercise of their FIRST AMENDMENT rights--contrary to their rights secured via the FOURTH AMENDMENT applicable to them via the said FOURTEENTH AMENDMENT clauses aforesaid." Second Amended Complaint at ¶ 26. The court has already determined that the First Amendment claim is without merit. Moreover, whether an arrest was reasonable must be judged objectively, without regard to underlying intent or motivation. See Graham v. Connor, 109 S.Ct. 1865, 1872 (1989). Thus, the ques-

tion before the court is whether the defendants had probable cause to arrest Currier, Braun and Althiser on February 19, 1986.

As the defendants point out, the existence of probable cause is an absolute bar to a section 1983 claom arising out of an arrest or pretrial detention regardless of the lack of good faith or malicious motives on the part of the law enforcement officers. See Bergren v. City of Milwaukee, 811 F.2d 1139, 1142 (7th Cir. 1987); Kompare v. Stein, 801 F.2d 883, 891 (7th Cir. 1986). In this case the record shows that each of the three plaintiffs was arrested by one or more of the defendants and that each of the plaintiffs was subsequently convicted by a jury of one count of disorderly conduct.[3] After being found guilty, the plaintiffs appealed their convictions to the Wisconsin appellate courts. The judgment of the trial court was affirmed in each case.

Once probable cause has been actually litigated, found, and made part of a final judgment, the doctrine of collateral estoppel applies. Under this doctrine a federal court must give the same preclusive effect to a state court ruling as would a court in the rendering state. See Migra v. Warren City School District Board of Education, 465 U.S. 75, 81 (1984). Therefore, the Wisconsin rules governing collateral estoppel apply to this case. Wisconsin law bars parties from relitigating issues that were "litigated, determined, and necessary to the decision in the prior proceeding." Reckner v. Reckner 105 Wis.2d 425, ___, 314 N.W.2d 159, 165 (Ct. App. 1981) (citing State ex rel. Flowers v. Department of Health & Social Services, 81 Wis.2d 376, ___, 260 N.W.2d 727, 734 (1978)). Wisconsin courts do not require a mutuality of parties where collateral estoppel is "asserted defensively to prevent a party from reliti-

gating an issue which has been conclusively resolved against that party in a prior case." Crowell v. Heritage Mutual Insurance Company, 118 Wis.2d 120, ___, 346 N.W.2d 327, 330 (Ct. App. 1984). Therefore, Wisconsin would give preclusive effect to state court determinations on issues that were: (1) identical; (2) actually litigated; and (3) necessary to the state court's final judgment. See Schneider v. Mistele, 39 Wis.2d at ___ n.5, 158 N.W.2d 383, 384 n.5 (1968); Reckner, 105 Wis.2d at ___, 314 N.W.3d at 165. A corollary to these requirements is that the parties being precluded must have had a fair opportunity procedurally, substantively, and evidentially to litigate their claims in the first proceeding. See Crowell, 118 Wis.2d at ___, 346 N.W.2d at 331.

In this case the fact that the Waukesha County Circuit Court juries found sufficient proof of all the elements neces-

sary to convict each of the plaintiffs of disorderly conduct establishes that the defendants had probable cause to arrest Currier, Braun and Althiser. Nevertheless, the three plaintiffs attempt to escape claim preclusion by contending that they were not afforded a full and fair procedural opportunity to contest the issue of probable cause during their trials and that they were unfairly prejudiced by court rulings "which effectively would not let the plaintiffs bring in evidence relating to past conduct of the officers towards members of AHF. The individual defendants were also not able to present to their respective juries all facts of the encounter of February 19, 1986, as the court limited each defendant only to the incidents which involved that particular plaintiff." Plaintiffs' Brief in opposition to Defendants' Motion for Summary Judgment at 2. They say that:

> The plaintiffs assert that there is abundant reason to doubt the fairness of the state court proceedings to which they were subjected. Despite repeated requests, the state circuit courts refused plaintiffs' request to consolidate their cases. The juries in each case therefore did not have the benefit of hearing about the interrelationship between each arrest. The plaintiffs also did not have the opportunity to raise the issue of the denial of First Amendment rights as the reason behind their arrests. The juries in the criminal cases were not aware of the animosity of the defendants towards persons in the American Heritage Forum.

Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 10.

In replying to the plaintiffs' arguments, the defendants point out that the consolidation motions brought by Braun and Currier were considered several times by the state courts and were denied because of procedural errors. See April 21, 1989 Affidavit of Raymond J. Pollan at Exhibit T, pp 10-14.

The defendants also note that Braun and Currier did not challenge these rulings in their appeals and that plaintiff Althiser never moved for consolidation.

Parties opposing a defense of claim preclusion on the ground that they were denied a full and fair procedural opportunity to litigate an issue must establish that they did not have the incentive to litigate the issue vigorously in the first action; or that there is a substantial difference in the procedures available in the two actions; or that effective litigation was limited by the nature of the relationship among the parties to the first action. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4423 (1981). The only federal requirement is that the prior state proceedings must have satisfied the minimal procedural requirements of the Due Process Clause. See Leal v. Krajewski,

803 F.2d 332, 334 (7th Cir. 1986)

The plaintiffs meet none of these tests. A mere showing that the Waukesha County Circuit Court, in the exercise of its discretion, denied their consolidation motions and did not admit all the evidence they attempted to present does not lead to the conclusion that their state court trials were procedurally deficient or fundamentally unfair. The plaintiffs have given this court no reason to doubt that they had a full and fair procedural opportunity to litigate the issue of probable cause in their state court trials.

The plaintiffs also assert that:

> There are also serious questions presented regarding the integrity of the evidence used to obtain convictions of plaintiffs. Plaintiff Currier attempted to challenge the integrity of the evidence of various pretrial hearings, including a probable cause hearing, but he was denied the opportunity. When Mr. Currier tried to explain that he was merely serving legal process, Judge Murphy responded, "We are

> not here to try the case today . . . Whether there was legal service of process appears to me to have no bearing on whether there was sufficient probable cause for the complaint to contain the three allegations."

Id. at 11 (citation omitted). Such challenges to the integrity of evidence presented at pretrial hearings can be maintained only when a party is ultimately acquitted or not tried on a charge. See e.g., Bailey v. Andrews, 811 F.2d 366, 370 (7th Cir. 1987). In this case, because all three plaintiffs were convicted of disorderly conduct at full-fledged trials, their inability to challenge the integrity of the evidence at the pretrial hearings is irrelevant.

In sum, the plaintiffs have failed to show that they were denied a full and fair opportunity to litigate the issue of probable cause at their state criminal trials. Therefore, they collaterally estopped from relitigating in this lawsuit the issue of whether the defendants

had probable cause to arrest them. Accordingly, the court will grant summary judgment in favor of the defendants on the claims for arrest and detention without probable cause.

2. Excessive Force

For their Third Cause of Action the plaintiffs allege that:

> [T]he respective Defendants did intentionally and willfully perpetrate a battery and did use unreasonable and unnecessary force in the seizure of each said Plaintiff with malicious intent to injure Plaintiffs and cause them to incur such bodily injury, associated pain and suffering, reasonable and necessary medical costs and, as to Plaintiff BRAUN, an increased permanency to his prior physical disability--contrary to said Plaintiffs' respective rights secured for them pursuant to said FOURTH AMENDMENT and the EIGHTH AMENDMENT guarantees against cruel and unusual punishment as applicable to them by and further pursuant to the Due Process and Equal Protection clauses of said FOURTEENTH AMENDMENT.

Second Amended Complaint at ¶27.

Recently, the United States Supreme Court held that: Where an excessive force claim arises in the context of an arrest of a free citizen, "it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be sucure in their persons . . . against unreasonable . . . seizures' of the person." Graham v. Connor, 109 S.Ct. 1865, 1871 (1989). See also Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987). Consequently, the plaintiffs in this case can make a viable excessive force claim only under the Fourth Amendment and their claims under the Eighth and Fourteenth Amendments must be dismissed.

In moving for summary judgment on the remaining portion of the plaintiffs' Third Cause of Action, the defendants argue that the plaintiffs are collaterally estopped from relitigating the

issue of whether the New Berlin police officers used excessive force. However, the movants have failed to meet their burden of showing that a resolution of the issue of whether the force used in making the arrests was reasonable was necessary to the judgments of conviction in the prior actions. It appears that this issue was not determined because Currier was charged, but not convicted, of obstructing an officer; Braun was charged, but not convicted, of resisting arrest; and Althiser was charged, but not convicted, of resisting arrest. The disorderly conduct convictions did not necessitate findings that the officers used only reasonable force in effecting the arrests. Therefore, the plaintiffs are not collaterally estopped from litigating the excessive force issue.

Next, the defendants argue that they are entitled to qualified immunity from

a suit for money damages on the excessive force claims because they acted reasonably under the circumstances and did not use greater force than was necessary to make the arrests. To determine whether police officers are entitled to qualified immunity, a court must conduct a two-part analysis by asking: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? See Wade v. Hegner, 804 F.2d 67, 70 (7th Cir. 1986)

In general, an officer who uses excessive force to arrest a person has unreasonably seized that person in violation of the Fourth Amendment. See Lester, 830 F2d at 713. In this case it is undisputed that the defendants used force. The question is whether the manner or degree of force was reasonable. Arriving at an answer involves

carefully balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 109 S.Ct. at 1871 (citations omitted). However, the "'test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers of(sic) others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 1871-72 (citations omitted).

In the instant case the court has determined that the defendants had probable cause to arrest the plaintiffs for the misdemeanor of disorderly conduct.

It is also undisputed that all three plaintiffs resisted or attempted to evade arrest. But, in all other respects, the facts relevant to the excessive force in arresting them in violation of their rights guaranteed by the Fourth Amendment. The plaintiffs' claims in the Third Cause of Action that the defendants deprived them of rights guaranteed by the Eighth and Fourteenth ARE DISMISSED on their merits.

It is FURTHER ORDERED that the plaintiffs' Fourth Cause of Action is DISMISSED on its merits. See Federal Rule of Civil Procedure 12(b)(6).

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 15th day of June, 1989.

Thomas J. Curran
United States District Judge

FOOTNOTES

Footnote /1 from page 15.

In their response to the summary judgment motion the plaintiffs have stated that: "Based upon the factual development of the case, and the applicable case law, plaintiffs would agree that dismissal of their pendent state claim of defamation would be authorized." Plaintiffs' Brief in Opposition to Defendants' Motion for summary Judgment at 1. Therefore, this claim will not be considered.

Footnote /2 from page 24.

According to the Plaintiffs the American Heritage Forum is:

> . . . an active Christian group which emphasizes non-violent protest techniques and a return to America's common law heritage. The group believes that contemporary statutory enactments and judicial proclamations do not comport with the original vision of the drafters of the United States and Wisconsin Constitutions. Members of AHF feel it is their duty to challenge the authority granted government by present day statutes and

> judicial decisions. To that end, AHF members often assemble peaceably for the purpose of petitioning governmentsl bodies to listen to their grievances. Their primary methods of presenting challenges to government authority are peaceful demonstrations and court challenges to their arrests.

[Plaintiffs'] Statement of Afcts at 1.

Footnote /3 from page 29.

The fact that each of the plaintiffs was acquitted of additional charges does not have any bearing on the probable cause issue.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

DECEMBER 4, 1990

Hon. WILLIAM J. BAUER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 89-2995

WILLIAM E. CURRIER and ROBERT C. BRAUN, Plaintiffs-Appellants, vs. SERGEANT CHARLES J. BALDRIDGE, and CORPORAL ROBERT D. OSBORN, police officers of the New Berlin Police Department and all those acting in concert on conspiracy therewith, Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Wisconsin No. 88 C 191 Thomas J. Curran, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed in the above-entitled cause

by plaintiffs-appellants William E. Currier and Robert C. Braun on November 9, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.